

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SERVICE EMPLOYEES INTERNATIONAL UNION,
DAVID REGAN and ELISEO MEDINA, as trustees for
SEIU UNITED HEALTHCARE WORKERS-WEST
and fiduciaries of the SEIU UNITED HEALTHCARE
WORKERS-WEST AND JOINT EMPLOYER
EDUCATION FUND, SEIU UNITED HEALTHCARE
WORKERS-WEST, an unincorporated association and
fiduciary of the SEIU UNITED HEALTHCARE
WORKERS-WEST AND JOINT EMPLOYER
EDUCATION FUND, and REBECCA COLLINS, as a
participant in the SEIU UNITED HEALTHCARE
WORKERS-WEST AND JOINT EMPLOYER
EDUCATION FUND,

Plaintiffs,

v.

SAL ROSELLI, JORGE RODRIGUEZ, JOAN
EMSLIE, JOHN BORSOS, JOHN VELLARDITA,
GABE KRISTAL, PAUL KUMAR, MARTHA
FIGUEROA, BARBARA LEWIS, PHYLLIS
WILLETT, DANIEL MARTIN, LAURA KURRE,
RALPH CORNEJO, WILL CLAYTON, GLENN
GOLDSTEIN, FRED SEAVEY, MARK KIPFER,
AARON BRICKMAN, IAN SELDEN, GAIL
BUHLER, FREJA NELSON, ANDREW REID,
NATIONAL UNION OF HEALTHCARE WORKERS;
MARYRUTH GROSS, CONNIE WILSON, ARLENE
PEASNALL, CHERIE KUNOLD, FAYE LINCOLN,
and DOES 1 through 100, inclusive,

Defendants.

No. C 09-00404 WHA

**CLARIFICATION OF
ORDER REGARDING
DEFENDANTS'
REQUEST TO
CONVERT MOTION**

Defendants have moved to dismiss claim two of the complaint (Dkt. No. 161).

Defendants previously requested that the hearing on the motion be rescheduled and held in
conjunction with plaintiffs' motion for partial summary judgment, which also focuses on claim

1 two, and that their motion to dismiss be converted to a motion for summary judgment pursuant
2 to Rule 12(d), which states:


3 If, on a motion under Rule 12(b)(6) or 12(c), matters outside the
4 pleadings are presented to and not excluded by the court, the
5 motion must be treated as one for summary judgment under Rule
6 56. All parties must be given a reasonable opportunity to present
7 all the material that is pertinent to the motion.

8 Plaintiffs had presented matters outside of the pleadings — a letter — in their opposition
9 to defendants' motion to dismiss. A May 22 order granted defendants' request, noting that it
10 made sense to hear the two motions at the same time as both pertained to claim two. Plaintiffs
11 now object to conversion. Plaintiffs request that the hearing on the motion be delayed to afford
12 them an opportunity for further discovery and to present additional evidence if the motion is to
13 be treated as a Rule 56 summary-judgment motion.

14 The hearing on the motion will proceed on June 4 as scheduled, but the motion will at
15 present be approached as a motion to dismiss. The motion is fully briefed and challenges the
16 sufficiency of the pleadings with respect to claim two. The Court, of course, cannot permit one
17 side to go beyond the pleadings and not also permit the other side to do so, but conversion and
18 the opportunity to present "all the material" pertinent to the motion are required only if the
19 submissions outside of the pleadings are not excluded by the Court. If after the hearing the
20 Court determines that recourse to matters outside of the pleadings is necessary or appropriate,
21 the Court will at that time address whether further discovery and/or briefing are required.

22 **IT IS SO ORDERED.**

23 Dated: June 1, 2009.

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26 WILLIAM ALSUP
27 UNITED STATES DISTRICT JUDGE
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